87-3840

Supreme Court, U.S.
FILED
SEP 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FRANCK K. BELIZAIRE
SEAMAN, UNITED STATES NAVY,
Petitioner,

v

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

JAMES J. QUIGLEY
Lieutenant Commander,
United States Navy
Counsel of Record

and

ANTHONY D. DOKURNO
Lieutenant,
United States Navy
Appellate Defense Counsel

Navy-Marine Corps Appellate
Review Activity
Washington Navy Yard, Building 200
Washington, D.C. 20374
(202) 433-3600

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether the petitioner had the right under the Fifth Amendment to the Constitution of the United States to be informed by the military trial judge of his absolute right to testify truthfully in his own behalf at his general court-martial, where there is no evidence that the petitioner's waiver of his right to testify was voluntary, knowing, intentional, and unimpaired by his trial defense counsel?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	3
CONCLUSION	7
APPENDIX A	1a
APPENDIX B	6a

TABLE OF AUTHORITIES

CASES:	Page
Brooks v. Tennessee, 406 U.S. 605 (1972)	5
Johnson v. Zerbst, 304 U.S. 458 (1938)	4,5
People v. Curtis, 681 P.2d 504 (Colo. 1984)	5,6
People v. Mozee, 723 P.2d 117 (Colo. 1986)	5
Taylor v. United States, 414 U.S. 17 (1973)	7
United States v. Belizaire, 24 M.J. 183 (C.M.A. 1987)	6
UNITED STATES CONSTITUTION:	
Amendment V	2,7
STATUTES:	
28 U.S.C. § 1259 (3)	2
Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (1982)	
Article 39 (a) (10 U.S.C. § 839 (a))	2
Article 92 (10 U.S.C. § 892)	2
Article 134 (10 U.S.C. § 934)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No.

FRANCK K. BELIZAIRE
Seaman, United States Navy,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Franck K. Belizaire, respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Military Appeals entered in this proceeding on July 6, 1987.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 24 M.J. 183 (C.M.A. 1987) (Appendix A). The *per curiam* opinion of the United States Navy-Marine Corps Court of Military Review, dated September 20, 1984, was unpublished. (Appendix B).

JURISDICTION

The decision of the United States Court of Military Appeals was rendered on July 6, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259 (3).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides: "No person shall be . . . deprived of life, liberty, or property without due process of law. . ."

STATEMENT OF THE CASE

The petitioner was tried by general court-martial on 9, 18, 21, and 22 March 1983 for allegedly violating Articles 92 and 134, Uniform Code of Military Justice (10 U.S.C. §§ 892, 934). [Hereinafter cited as UCMJ]. The petitioner did not testify at his trial on the merits. Contrary to his pleas, the petitioner was found guilty and sentenced to dishonorable discharge from the United States Navy, confinement at hard labor for four years, total forfeiture of pay and allowances, and reduction to the lowest enlisted paygrade. The military convening authority approved the findings and sentence as adjudged.

On 24 January 1984 the United States Navy-Marine Corps Court of Military Review ordered that a post-trial hearing be held pursuant to Article 39 (a), UCMJ (10 U.S.C. § 839 (a)) to determine whether, among other issues, the petitioner had been improperly denied the right to testify in his own behalf. The military trial judge found that trial defense counsel had informed the petitioner that the decision to testify was his alone. However, it is undisputed that the military trial judge at no time informed the petitioner that he had the right to testify in his own behalf at his court-martial.

On 20 September 1984 the United States Navy-Marine Corps Court of Military Review affirmed the findings of

guilty and the sentence. It also summarily held that the petitioner was not prevented by his counsel from testifying in his own defense.

The United States Court of Military Appeals on 5 June 1985 granted review of two issues:

I. WHETHER APPELLANT'S CONSTITUTIONAL RIGHT TO TESTIFY IS SO FUNDAMENTAL AS TO REQUIRE THAT WAIVER OF SAID RIGHT BE VOLUNTARY, KNOWING, INTENTIONAL, AND A MATTER OF RECORD;

II. WHETHER SPECIFICATION 9 OF CHARGE I (POSSESSION OF 649.08 GRAMS OF MARIHUANA ON 5 AUGUST 1982) IS MULTIPLICIOUS FOR FINDINGS WITH CHARGE II AND ITS SPECIFICATION (POSSESSION OF 649.08 GRAMS OF MARIHUANA WITH THE INTENT TO DISTRIBUTE ON 5 AUGUST 1982).

On 6 July 1987 the United States Court of Military Appeals reversed the United States Navy-Marine Corps Court of Military Review with regard to Issue II and dismissed specification 9 of Charge I, but affirmed the United States Navy-Marine Corps Court of Military Review's judgment with regard to Issue I.

REASONS FOR GRANTING THE WRIT

This Court has never specifically held that a trial judge must ask the accused himself, on the record, whether he understands that he has the fundamental right to testify in his own behalf when it appears that counsel do not intend to call him as a witness at his trial on the merits. However, there are sound reasons for such a holding by this Court. As will be shown below, this Court has repeatedly emphasized the im-

portance of the right to speak in one's own defense and at least one state supreme court has made just such an explicit requirement to ensure that an unambiguous appellate record is established reflecting the fact that an accused's waiver of his fundamental right to testify is voluntary, knowing, and intelligent.

The facts surrounding the petitioner's waiver of his right to testify are indeed ambiguous. In his affidavit submitted to the United States Navy-Marine Corps Court of Military Review and in his testimony at a post-trial hearing the petitioner stated that he repeatedly asked his trial defense attorneys to allow him to testify, but that they refused or failed to permit him to do so. (R. 160, 163-167, 169). The petitioner stated that he made these requests in both oral and written form. (R. 163-164). One of the petitioner's military defense attorneys confirmed that the petitioner had made certain writings to him during the course of the trial, but that any writings made by counsel or the petitioner had been destroyed sometime after trial. (App.Ex. V). On cross-examination during the post-trial hearing, one of the petitioner's military defense counel said that he "may have" asked to testify. (R. 129, 131).

In *Johnson v. Zerbst*, 304 U.S. 458 (1938), a case involving waiver of the right to counsel, this Court stated, "While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record." *Id.*, at 465. The *Johnson* Court's rationale for the exercise of such caution was that our courts do not presume an accused's acquiescence in the waiver of fundamental rights. *Id.*, at

464. On the contrary: they " 'indulge every reasonable presumption against waiver.' " *Id.*, at 465 [citations omitted]. In *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972) this Court declared, "Whether the defendant is to testify is an important tactical decision as well as a matter of *constitutional right.*" [Emphasis added].

The Colorado Supreme Court has required that trial judges inform accuseds of their right to testify and of their right to overrule trial defense counsel's contrary advice whenever it appears that the defendant is about to remain silent throughout the defense's case. *People v. Curtis*, 681 P.2d 504 (Colo. 1984). It reasoned that, "[S]ome rights are so inherently personal and basic that [the] fundamental fairness of a criminal trial is called into question if they are surrendered by anyone other than the accused, or if the accused relinquishes them in any manner other than by voluntary, knowing and intentional waiver." *Id.*, at 511, *citing Johnson v. Zerbst*, 304 U.S. 458 (1938). It also noted that such an inquiry by the judge at trial resolves any ambiguities regarding the voluntariness of waivers and enhances meaningful appellate review. *Id.*, at 511-512. Perhaps most importantly, it guarantees faith and confidence in our system of justice. An accused is allowed, even encouraged, to "tell his side of the story" if he or she so desires. *Id.*, at 513-514. As the court later noted in *People v. Mozee*, 723 P.2d 117, 124-125 (Colo. 1986), an accused's desire to testify may be overwhelmed by a defense counsel's eagerness to win the case. Even if testifying is in fact ill-advised, the accused must be allowed to tell the jury his side of the story. The perceived legitimacy of the trial depends upon it. *Id.*, at 125. However ill-advised, the defendant's right to testify

is guaranteed by the due process clauses of the United States Constitution and the Colorado Constitution. *People v. Curtis*, 681 P.2d at 509-510.

In its opinion below, the United States Court of Military Appeals declined to impose the *Curtis* requirement on the military. That court reasoned that no warning by the trial judge is required because "most persons" are aware of their right to testify; it is therefore less necessary to inform an accused of his right to testify than to affirmatively inform him of his right to remain silent. *United States v. Belizaire*, 24 M.J. 183, 184 (C.M.A. 1987) (Appendix A at 4a). Further, it reasoned, an accused at a court-martial "is provided competent counsel, who advises him of his rights." *Id.*, at 185 (Appendix A at 5a).

Unfortunately, the United States Court of Military Appeals seems to have overlooked a salient fact: the petitioner has maintained throughout the proceedings that his defense counsel *prevented* him from testifying. (R. 160, 163-167, 169). Even if the petitioner was aware of his right to testify, he may well have been unaware of his right to overrule his defense counsel's decision not to allow him to take the witness stand. In any event, we cannot determine with certainty that the petitioner's waiver of his Due Process right to testify was voluntary, knowing, and intelligent. If the petitioner had had a *Curtis*- type warning, any further dispute between the petitioner and his defense counsel would have been foreclosed.

It is especially important that a military accused be so informed. Military trial defense counsel are always commissioned officers of their services; accuseds often are not. In the case at bar the petitioner had the rank of E-3 in the United States Navy; his trial

defense attorneys had the rank of Navy Lieutenant. Under normal conditions the petitioner would be required to respond to his superiors' orders and requests without hesitation or complaint. Enlisted military accuseds must feel even less inclined to contradict the express desires of their defense counsel than their civilian counterparts.

The petitioner does indeed concede that cases may arise in which an accused's waiver of the right to testify and confront the witnesses against him is unambiguous. For example, in *Taylor v. United States*, 414 U.S. 17 (1973), the accused voluntarily absented himself from his trial after it had begun. This Court held that, even though the trial judge had not informed him that his trial would proceed without him if he voluntarily absented himself, it could be presumed the defendant was well aware of his right to be present. *Id.*, at 20. Furthermore, unlike the petitioner, the *Taylor* defendant never claimed he was unaware of his rights or that he had been prevented from exercising them. *Id.*

In the petitioner's case a one or two sentence colloquy with the military trial judge would have avoided a substantial waste of judicial resources. The petitioner could not now claim to have been prevented from telling his "side of the story." There would have been no question that the petitioner had received the full measure of his Due Process rights under the Fifth Amendment to the United States Constitution.

CONCLUSION

The petitioner respectfully submits that his petition for a writ of certiorari should be granted in the interest of the fair administration of justice and re-

quests that he be afforded the opportunity to testify in his own behalf at a newly-convened court-martial.

Respectfully submitted,

James J. Quigley
Lieutenant Commander,
United States Navy
Counsel of Record

and

Anthony D. Dokurno
Lieutenant,
United States Navy
Appellate Defense Counsel

Navy-Marine Corps Appellate
Review Activity
Washington Navy Yard,
Building 200
Washington, D.C. 20374
(202) 433-3600

APPENDIX

APPENDIX A

U.S. Court of Military Appeals.

No. 50,984.
UNITED STATES,

Appellee,

v.

Franck K. BELIZAIRE, Seaman U.S. Navy,

Appellant.

NMCM 83 2859.

July 6, 1987.

Accused, a seaman in the United States Navy, was convicted by general court-martial of various offenses involving marijuana. The Court of Military Review affirmed. Review was granted, 20 M.J. 302. The Court of Military Appeals, Everett, C.J., held that: (1) possession of marijuana offense was included within charge of possession with intent to distribute; accordingly, lesser offense would be dismissed, and (2) accused's constitutional right to testify was not so fundamental as to require military judge to advise accused that he was entitled to testify.

Reversed in part and affirmed in part.

For Appellant: *Grey D. McCormack, Esq.* and *Lieutenant Daniel Lippman, JAGC, USNR.*

For Appellee: *Captain W.J. Hughes JAGC, USN* and *Captain David B. Stratton, USMC.*

Opinion of the Court

EVERETT, Chief Judge:

A military judge sitting alone as a general court-martial found Belizaire guilty of various offenses involving mari-

juana, in violation of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934, respectively, and sentenced him to a dishonorable discharge, confinement for 4 years, total forfeitures,* and reduction to the pay grade of E-1. The findings and sentence were approved by the convening authority. After a limited rehearing on the issue of adequacy of counsel, the Court of Military Review affirmed the trial results. We granted review of a multiplicity issue specified by the Court (20 M.J. 302) and also of this issue raised by counsel:

> WHETHER APPELLANTS CONSTITUTIONAL RIGHT TO TESTIFY IS SO FUNDAMENTAL AS TO REQUIRE THAT WAIVER OF SAID RIGHT BE VOLUNTARY, KNOWING, INTENTIONAL, AND A MATTER OF RECORD.

I

The specified issue concerned a specification alleging that appellant possessed 649.08 grams of marijuana on a certain date (specification 9 of Charge I) and another specification alleging his possession of an identical quantity of that substance on the same date with the intent to distribute it (Charge II and its specification). Obviously, the simple possession offense is included within the charge of possession with intent to distribute; and so it should be dismissed. *See United States v. Zupancic,* 18 M.J. 387, 388 (C.M.A. 1984). However, appellant is not entitled to relief as to sentence because of this action.

II

Appellant claims now that, during the trial, he requested his counsel to let him testify in his own behalf but that

---

*The action only permitted forfeiture of *pay* from the date the action was signed; forfeiture of allowances is only effective when the sentence is ordered executed. *See* Art. 57(a) and (c), Uniform Code of Military Justice, 10 U.S.C. § 857(a) and (c).

counsel refused or failed to let him do so. In this connection, he emphasizes that, at trial, the military judge gave him no advice that he was entitled to testify. Accordingly, the defense contends that appellant's failure to testify resulted from his unawareness of his testimonial rights, so his conviction should be set aside to give him an opportunity to tell his side of the story at a rehearing.

The right to testify is constitutionally protected. *See Brooks v. Tennessee*, 406 U.S. 605, 612, 92 S.Ct. 1891, 1895, 32 L.Ed.2d 358 (1972); *Ashe v. North Carolina*, 586 F.2d 334 (4th Cir. 1978), *cert. denied*, 441 U.S. 966, 99 S.Ct. 2416, 60 L.Ed.2d 1072 (1979); *Alicea v. Gagnon*, 675 F.2d 913 (7th Cir. 1982). Moreover, in some instances it has been required that the record show that the failure to exercise a constitutional right was voluntary, knowing, and intentional. *Cf. Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

In some respects, it is desirable for an accused to be specifically advised by the military judge of his right to take the stand. In this way, little room will be left for a convicted accused to complain that he has been prejudiced by his counsel's negligence in failing to inform him that he could testify. Nonetheless, we are unconvinced that this Court should impose such a warning requirement.

Admittedly, warnings have sometimes been required in order to protect important constitutional rights. Thus, Congress enacted Article 31(b) of the Uniform Code of Military Justice, 10 U.S.C. § 831(b), so that servicemembers would be well aware that commanders or military investigators could not compel them to answer questions. However, not every right must be accompanied by specific advice as to its availability. For example, we do not require that a service member be advised of his right to represent himself at a trial by court-martial. *United States v. Bowie*, 21 M.J. 453 (C.M.A. 1986). Likewise, neither we nor the Supreme Court have required that a request for consent to search

be accompanied by advice that the consent need not be given. *United States v. Insani,* 10 U.S.C.M.A. 519, 28 C.M.R. 85 (1959); *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

Both the Fifth Amendment and Article 31 reflect a concern that someone may be compelled to incriminate himself. However, we have not found any specific constitutional or statutory provision or any judicial precedent which indicates a worry that an accused will not be aware of his right to testify.

At common law, defendants in a criminal trial were incompetent to testify. *See Washington v. Texas,* 388 U.S. 14, 20, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967). As early as 1878, Congress abolished this disqualification in federal criminal trials and permitted a defendant to testify at his own request. 20 Stat. 30. *See Benson v. United States,* 146 U.S. 325, 336, 13 S.Ct. 60, 63, 36 L.Ed. 991 (1892). The incompetence of a criminal defendant to testify was carried forward in the law of only one state, *see Ferguson v. Georgia,* 365 U.S. 570, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961), until the Supreme Court finally ruled this disqualification was unconstitutional. *See generally Brooks v. Tennessee, supra,* 406 U.S. at 612, 92 S.Ct. at 1895 ("Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right"); *Washington v. Texas, supra,* 388 U.S. at 20 n. 14, 87 S.Ct. at 1924 n. 14 ("We have discussed elsewhere the gradual demise of the common-law rule prohibiting defendants from testifying in their own behalf. *See Ferguson v. Georgia," supra*).

By now, we believe that most persons—both in the armed services and outside—are aware that they have a right to testify at their trial. In this regard, the risk of a misunderstanding is much less than the risk of a misunderstanding about the existence of a right to remain silent. Accordingly, the need for a warning requirement is much

less in the former situation than in the latter. This is especially true in a court-martial, where each accused is provided competent counsel, who advises him of his rights.

Occasionally, an accused will wish to testify, but his defense counsel will urge him not to do so. Under such circumstances, his attorney can only advise—not require. The choice belongs exclusively to the accused, rather than to his lawyer. However, we do not believe that requiring a warning can be justified as a means of assuring that the accused is made aware that he is not bound by his lawyer's advice. Instead, the absence of advice from the bench is simply a circumstance to be considered in determining whether an accused was prejudiced by any failure of his lawyer to inform him that he was free to take the stand.

III

The decision of the United States Navy-Marine Corps Court of Military Review is reversed as to specification 9 of Charge I. The finding of guilty as to that specification is set aside, and that specification is dismissed. In all other respects, the decision below is affirmed.

Judges COX and SULLIVAN concur.

APPENDIX B

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVALL STREET
ALEXANDRIA, VA 22332

IN THE U.S. NAVY-MARINE CORPS COURT OF MILITARY REVIEW
BEFORE
ALBERT W. EOFF II, J. S. MAY, MICHAEL D. RAPP

UNITED STATES
v.

FRANCK KERNIZAN BELIZAIRE, 073 56 2567,
Seaman (E-3), U. S. Navy
NMCM 83 2859 DECIDED 20 September 1984

Sentence adjudged 22 March 1983
Review pursuant to Article 66(c), UCMJ

of General Court-Martial convened by Commander, Naval Base, Norfolk, Virginia 23511

LT Daniel Lippman, JAGC, USNR, Appellate Defense Counsel
Greg D. McCormack, Esq., Civilian Defense Counsel
CAPT David B. Stratton, USMCR, Appellate Government Counsel

PER CURIAM:

We have examined the record of trial, the trial defense counsel's clemency petition, the appellant's letter of 15 June 1983, the assignments of error, and the Government's reply thereto, and have concluded that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the accused was committed.

Assuming that DT3 Montas' testimony would have been material, we find the evidence of record establishes beyond a reasonable doubt that such testimony would not have tipped the balance in favor of the appellant and that the evidence of the appellant's guilt is otherwise so strong as to show no reasonable possibility of prejudice. *United States v. Lucas*, 5 MJ 167, 172 (CMA 1978). Any defects in the staff judge advocate's review were waived by the failure of the defense to submit a *Goode* response. 1 MJ at 6. We find that appellant was not prevented by his counsel from testifying in his defense. Although a response to the staff judge advocate's review (pointing out its incomplete and misleading discussions of the defense request for the presence of DT3 Montas) would have been appropriate, we conclude that failure to submit such response did not rise to the level of ineffective assistance of counsel. *United States v. Jefferson*, 17 MJ 728 (NMCMR 1983). The military judge did not overstep the bounds of neutrality in questioning witnesses during the Article 39(a) session ordered by this court.

Accordingly, the findings of guilty and sentence, as approved on review below, are affirmed.

/s/ Albert W. Eoff II
ALBERT W. EOFF II, Chief Judge

/s/ J. S. May
J. S. MAY, Judge

/s/ Michael D. Rapp
MICHAEL D. RAPP, Judge